

Human Rights and the Ninth Amendment: a New Form of Guarantee

Jordon J. Paust

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Jordon J. Paust, *Human Rights and the Ninth Amendment: a New Form of Guarantee*, 60 Cornell L. Rev. 231 (1975)
Available at: <http://scholarship.law.cornell.edu/clr/vol60/iss2/3>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

HUMAN RIGHTS AND THE NINTH AMENDMENT: A NEW FORM OF GUARANTEE

Jordon J. Paust†

*We hold these truths to be self-evident: that all men are created equal;
that they are endowed, by their Creator, with certain unalienable Rights;
that among these are life, liberty, and the pursuit of happiness.*

THE DECLARATION OF INDEPENDENCE, 1776

Even those who are aware only of the two instances of substantial and violent human rights deprivation which occurred in Bangladesh a few years ago and in much of Nazi-controlled Europe over a quarter of a century ago should readily recognize the intense interdependency that exists between peace and the effective realization of fundamental human values. Such a recognition has been made by the United Nations,¹ and the United Nations Charter contains a related pledge of the United States and all other member nations to take joint and separate action in cooperation with the UN for the effective implementation of a "universal respect for, and observance of, human rights and fundamental freedoms for all."² Not only has it been recognized that human rights and peace are interdependent, but many observers have also noted an increasing interdependency among all people which should form the basis for a cooperative concern for the rights of others.³ Thomas Paine expressed this same principle of interdependence when he declared that "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to

† J.S.D. Candidate, Yale University; Associate Professor, University of Houston; Member American Society of International Law; Secretary on International Law, ABA Committee on Human Rights. A.B. 1965, J.D. 1968, University of California at Los Angeles; LL.M. 1972, University of Virginia.

¹ See, e.g., G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970).

² U.N. CHARTER arts. 55(c), 56. See also U.N. CHARTER preamble, art. 1(3). Of course, this pledge of the United States binds it to action under international law. See, e.g., Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410, 415 *passim* (1974).

³ See, e.g., McDougal, *Human Rights and World Public Order: Principles of Content and Procedures for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387 (1974); Paust & Blaustein, *supra* note 2; Paust & Blaustein, *The Arab Oil Weapon—A Reply and Reaffirmation*, 69 AM. J. INT'L L. — (1975); Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DEN. J. INT'L & POL. 29 (1971).

himself.”⁴ Indeed, by failing to effectuate the basic human rights of all members of our society, we lay the ground work for a deprivation which can eventually destroy the very human values that we claim to cherish.

Such recognition of the basic interdependence of human rights is of great importance to international lawyers,⁵ but it is also vital to those concerned with the guarantee of civil liberties, the curtailment of impermissible violence, and, hence, the continuation of a viable democracy in America. A proper and comprehensive inquiry into these concerns should cause one to ask whether there are shared and interdependent policies (goal-values) and expectations that have been documented over the years. Such documentation can be found in the Constitution, the writings of the early leaders of this country, the outcomes of a dynamic judicial process—“case law”—and the international human rights instruments,⁶ among others.⁷ One should ask whether there are substantive and procedural guarantees in United States law for the universal respect and observance of such fundamental human values. It is necessary to discover how and where each of these shared values has actually been implemented in the social process; for if basic human values have not been guaranteed to each member of our society, then all of us remain in an uncertain peace and possess tenuous liberties.⁸

⁴ 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed. 1945).

⁵ This importance is generally acknowledged by the community of international lawyers.

⁶ Relevant human rights instruments include: U.N. CHARTER, preamble, arts. 1(3), 55(c), 56 (1945); Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) [hereinafter cited as UNIVERSAL DECLARATION]; 1949 Geneva Conventions, [1949] 6 U.S.T. 3516, T.I.A.S. No. 3365; 1966 Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at 52, U.N. Doc. A/6316 (1966) (adoption by vote of 106-0-0; not yet ratified by United States).

⁷ See, e.g., McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60, 110-15 (1949). The authors express the view that there is necessarily an interdependency between universally shared values and our national values, and that the same forces and considerations apply to national values so as to make international rights “of nation-wide concern for our people” and any free society. For similar views of interdependency and the nature of “intergroup” expectations, see Reisman, *supra* note 3, at 30-36, 39-40. For discussion of the utility of treaties, executive acts, legislative acts, judicial decisions, the practice of peoples, and the works of jurists and scholars in ascertaining and applying international law in “questions of right,” see *The Paquete Habana*, 175 U.S. 677, 700 (1900). The same approach was used by the British prior to the American Revolution. See *Triquet v. Bath*, 96 Eng. Rep. 273 (K.B. 1764) (before Lord Mansfield). See also *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *Henfield’s Case*, 11 F. Cas. 1099, 1107-08, 1120 n.6 (No. 6360) (C.C.D. Pa. 1793).

⁸ The first codified law of European-Americans, the Connecticut Constitution of 1638, entered into and adopted by the towns of Windsor, Hartford, and Wethersfield Connecticut,

Some people have sought to secure a continuance of our inherited civil liberties and to guarantee the internationally recognized rights of man by arguing that the international law of human rights has become part of our law through the ratification of the United Nations Charter.⁹ This attempt to bring internationally recognized human rights into our domestic legal process as treaty law and, thus, part of the "supreme" law of the land through Article VI of the United States Constitution, has not succeeded.¹⁰

stated that "to mainteine the peace and union of such a people, there should bee an orderly and decent government . . ." and that "the free fruition of such libberties, immunities, priviledges, as humanity, civility and Christianity call for, as due to every man in his place and proportion, without impeachment and infringement, hath ever beene and ever will bee the tranquillity and stability of Churches and Commonwealths; and the denyall or deprivall thereof, the disturbance, if not ruine of both." See THE CODE OF 1650: BEING A COMPILATION OF THE EARLIEST LAWS AND ORDERS OF THE GENERAL COURT OF CONNECTICUT 11, 18 (S. Andrews ed. 1822). See also M. McDUGAL, STUDIES IN WORLD PUBLIC ORDER 338, *passim* (1960); McDougal & Bebr, *Human Rights in the United Nations*, 58 AM. J. INT'L L. 603, 606-07, 612 (1964); Solzhenitsyn, *Peace and Violence*, N.Y. Times, Sept. 15, 1973, § 1, at 31, col. 2.

⁹ See, e.g., *Sei Fujii v. California*, 217 P.2d 481 (Cal. App. 1950), *rev'd*, 38 Cal. 2d 718, 242 P.2d 617 (1952). *Contra*, *Oyama v. California*, 332 U.S. 633, 673 (1948) (Murphy & Rutledge, JJ., concurring); Hudson, *Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543 (1950); Wright, *Conflicts of International Law with National Laws and Ordinances*, 11 AM. J. INT'L L. 1 (1917); Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT'L L. 62 (1951). See also *Oyama v. California*, 332 U.S. 633, 649-50 (1948) (Black & Douglas, JJ., concurring); *Namba v. McCourt*, 185 Ore. 579, 604, 204 P.2d 569, 579 (1949); P. JESSUP, A MODERN LAW OF NATIONS 91 (1952); Bitker, *The Constitutionality of International Agreements on Human Rights*, 12 SANTA CLARA LAW. 279 (1972); Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012 (1968); McDougal & Leighton, *supra* note 7; Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEXAS L. REV. 6 (1971); Sayre, *Shelley v. Kraemer and United Nations Law*, 34 IOWA L. REV. 1 (1948); Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932); note 93 *infra*.

¹⁰ Actually, the UN Charter obligations are part of treaty law, and, by virtue of article VI of the Constitution, part of the "supreme law" of the land. Moreover, any statute that is inconsistent with human rights, as guaranteed under the UN Charter, should be struck down by the courts as unconstitutional. *Oyama v. California*, 332 U.S. 633, 673 (1948) (Murphy & Rutledge, JJ., concurring). See also *id.* at 649-50 (Black & Douglas, JJ., concurring); *Namba v. McCourt*, 185 Ore. 579, 604, 204 P.2d 569, 579 (1949). But since the highly controversial reversal of the *Sei Fujii* case by the California Supreme Court in an era of notable racial hysteria, other courts have been reluctant to apply human rights principles to questions of rights under federal or state law. This has been true despite the Supreme Court's statement that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). The usual doctrinal ploy given by courts that refuse to apply international human rights norms to questions of right as often as they come up is that the content of human rights obligations contained in our treaty law is too difficult for the court to discover and the treaty law obligations are not "self-executing," or are of no legal effect absent some specific implementing governmental legislation. See *Vlissidis v. Anadell*, 262 F.2d 398 (7th Cir. 1959); *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961); Pauling v.

Nevertheless, human rights activists still seem intent on continuing the quest for an Article VI form of guarantee, instead of exploring the several other bases for human value recognition and implementation.¹¹ It is the purpose of this Article, however, to focus on an alternative form of guarantee and to analyze the problems which have impaired its utility in the past. Hopefully, this focus will contribute to an ongoing and efficacious examination of what otherwise would have to be considered a tautology—that human rights must necessarily be our own rights, because *we* are human beings.

I

A NEW FORM OF GUARANTEE

A. *The Ninth Amendment*

The new form of human value guarantee considered here is not really new at all. It has suffered, however, from a lack of juridical use and from several misconceptions as to its nature and purpose. The alternative basis for the protection of fundamental human values is the ninth amendment—one of the shortest, but perhaps one of the most important, declarations in the United States Constitution. It states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Its utility lies not in asking how internationally recognized rights can be “implemented” into our domestic law through new legislative acts, but in recognizing that basic human rights are already a viable part of the constitutionally guaranteed rights of Americans. Perhaps it is true that our courts either have not recognized the existence of such a constitutional protection or have been unwilling to use it because they fear criticism for expounding arbitrary and personal social preferences.¹² It is apparent, however, that our Forefathers

McElroy, 164 F. Supp. 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir. 1960); *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952). *See also* *United States v. Vargas*, 370 F. Supp. 908, 915 (D.P.R. 1974). Thus, governments that do not legislate do not fear judicial or legislative restraint unless a particular right is also documented in the Constitution.

¹¹ The usual attempt is to seek United States ratification of human rights agreements and to obtain desirable implementing legislation thereafter. *See, e.g., Hearings on the Treaty-making Power of the United States in Human Rights Matters Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess., Appendix 18, at 731 (1974).

¹² *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 511-12, 519-25 (1965) (Black, J.,

definitely expected that the rights of man *would* be guaranteed under the ninth amendment.¹³ It also appears that we can recapture this intended utility of the ninth amendment, since a more broadly documented enumeration of the rights of man is now available for judicial discovery and use.

To the extent that the general boundaries and criteria necessary to discover the content of each type of right become identifiable in different arenas of the legal process, they should be used by the courts to effectuate shared expectations of "right" and should not simply be ignored. Indeed, the Declaration of Independence expressed to the world the expectation that all governmental bodies—and thus the members of the judiciary—were to function so as "to secure these rights" which are fundamental to all. The judiciary must recognize that its action or inaction will directly affect the realization of fundamental human expectations. Human rights policies are at stake in every form of human interaction and are relevant to every instance of authoritative decision. The judiciary cannot avoid its responsibility for rational and policy-serving decision by simplistic notions of noninvolvement, nor can it continue to ignore several rights of man with an egregious and self-deceiving claim of unfamiliarity with fundamental and continuous expectations that, as it happened, were not specifically listed some 200 years ago.¹⁴ Indeed, rational and policy-serving judicial decision-making can only occur where the effort is made to enrich decisional awareness of, and responsiveness to, policy and context, through a systematic exploration of all of the policies at stake and all of the relevant features of context which will condition the effects of decision and the serving of legal policy in social process.

dissenting); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787, 790 (1962).

¹³ See E. CORWIN, UNDERSTANDING THE CONSTITUTION 3-5, 132 (4th ed. 1967); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950). See also *Furman v. Georgia*, 408 U.S. 320 (1971) (Marshall, J., concurring) (referring to Patrick Henry's concern for guarantee of "human rights").

¹⁴ An example of this stated unfamiliarity is the expression of Justice Jackson that the ninth amendment rights "are still a mystery to me." R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 75 (1955). Compare Jackson's jurisprudential outlook with that of Thomas Jefferson, as etched over the entrance to a hall at the University of Virginia Law School: "That those alone may be servants of the law who labor with learning, courage and devotion to preserve liberty and promote justice." Neither liberty nor justice can function under the limitations of specific enumeration. See also Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1-2), 42 HARV. L. REV. 149, 365, 409 n.137 (1928-29).

B. *The Need for a More Comprehensive Focus*

In a sense, part of the failure of our adjudicatory process to guarantee a full range of fundamental human values to all persons in our society stems from a simplistic and formalistic jurisprudential inheritance of the nineteenth century that can be generalized as "legal positivism."¹⁵ Legal positivism replaced the naturalist school of thought which was dominant at the time of the American Revolution and the signing of our Constitution, and thus was not the philosophical world-view or approach to legal thinking that the Framers of the Constitution would have held in common.

In practice, legal positivism is actually a form of legal negativism, since it demands of its adherents a simple, myopic, and inhibiting reference to the words of enacted law. It ignores the entirety of legal process and a comprehensive orientation in social process, which are far more rational, relevant, and responsive to the whole range of policies, needs, and shared expectations which stand behind a set of printed words.¹⁶ It is not the purpose of this Article to expand upon the evils of formalistic, unresponsive legal thinking. Jurisprudential perspectives would not even be mentioned here except for the fact that they underlie each lawyer's conception of the juridical utility of a now dormant ninth amendment. They underlie as well the court's conception of its role in the implementation of the law, the securing of fundamental rights, and the discovery of a shared content for these rights. Thus, in a very real sense, a second form of guarantee that is interconnected with the utility of the ninth amendment would stem from a broader jurisprudential focus—a focus which, as it turns out, is more compatible with that of the Framers than that of the legal positivists.

With a comprehensive perspective, the courts could more easily and more rationally discover the content of rights which are not specifically enumerated in the Constitution but which are, nevertheless, rooted in the expectations of the people and in documented policy. A court which uses these sorts of indicia of "rights" content would not be acting arbitrarily, deferring to transcendental sources, or expounding a personal social preference. On

¹⁵ Noted positivists include Austin, Hart, Kelsen and Justice Black. See note 16 *infra*.

¹⁶ For a discussion of these and other inadequacies of legal positivism see, for example, Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968); Paust, *The Concept of Norm: A Consideration of the Jurisprudential Views of Hart, Kelsen and McDougal*, and Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, in 1 YALE STUDIES IN WORLD PUBLIC ORDER (1974).

the contrary, it would be rationally implementing social demands and expectations which are generally shared and which are empirically discernible. To do less will only be less rational and involve a decisional effort that is less responsive to overall legal policy and human needs. A court which sought to be more comprehensive would be performing the constituted function which is primary to any governmental entity—the securing of rights which the people expect. Furthermore, such a court can recapture the broader jurisprudential perspective thought necessary by the Framers of the Constitution, without resorting to the evils of a naturalist school—*e.g.*, ad hocery, autonomous concepts, personal viewpoints, arbitrary decision-making, and so forth¹⁷—or a newer and more egregious form of sensualist jurisprudence—the “I know it when I *feel* it” school. In a sentence, the courts can use a wider juristic focus to regain the original constitutional construct and to utilize international human rights as an interpretive aid for a proper application of the ninth amendment and the universal implementation of human rights as called for by the United Nations Charter.

II

THE CONSTITUTIONAL ROLE OF THE NINTH AMENDMENT

It seems clear from the language of the ninth amendment that certain rights exist even though they are not enumerated in the Constitution, that these rights are retained by the people, and that by express command these unenumerated rights are not to be denied or disparaged by any governmental body.¹⁸ It is also a generally accepted truism that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”¹⁹ The only problem, then, would appear to be how to develop some useful, rational, and policy-serving methodology for the discovery of the actual content of these rights. But no matter how clear these tenets seem to be, there are those who would confuse the role of

¹⁷ See sources cited note 16 *supra*.

¹⁸ See Corwin, *supra* note 14; Hamlin, *The Bill of Rights or the First Ten Amendments to the United States Constitution*, 68 COM. L.J. 233, 235-36 (1963); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787 (1959).

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J., for the Court). The ninth must be a part of the “scheme of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); see *Ullmann v. United States*, 350 U.S. 422 (1956). Justice Frankfurter stated that, “[a]s no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.” *Id.* at 428. For further discussion of this matter, see cases cited in Kelsey, *supra* note 18, at 312 n.34.

the ninth amendment in the scheme developed for the constitutional protection of human values and liberties.

The several obfuscating misconceptions that exist in the commentary are generally classifiable into four main arguments:

- (1) The ninth is a mere "policy" statement.
- (2) The ninth merely cuts back on the grant of "power" to the federal government.
- (3) The ninth is merely a "rule of construction."
- (4) The ninth is no longer needed in view of the fifth and fourteenth amendments.

A. *The Mere Statement of Policy Argument*

The main difficulty with the first view, that the ninth amendment is a mere "statement of policy" and not a constitutional guarantee of unenumerated rights,²⁰ is that whether one calls it a "policy" or a protective amendment, the intent still seems clearly expressed. That intent was specified in the language which states that certain unenumerated rights exist and which demands that these rights shall not, under any circumstances, be denied or disparaged.²¹ A court that did not seek comprehensive awareness and application of human rights policies would, in effect, be denying their existence or relevance and disparaging their efficacious role in social process. And clearly this, by command of the Constitution, is what a court must not do. The very fact that there are human rights "policies" makes it necessary to serve these policies through an integrative decisional effort.

B. *The Restriction on Federal Power Argument*

A second misconception, which also ignores the plain wording of the amendment, is that the ninth was established merely as a cut-back on the grant of *power* to the federal government and was not established to guarantee *rights* against denial or disparagement.²² Two possible positions can derive from this mis-

²⁰ See generally 2 J. STORY ON THE CONSTITUTION 651 (5th ed. 1891); Redlich, *supra* note 12; Note, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 WM. & MARY L. REV. 101 (1966).

²¹ See Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 628 (1956). The author points out that even if the ninth is only "declaratory" it must "declare something." *Id.* (emphasis added).

²² Justice Black has stated that the purpose of the ninth amendment was merely to "emphasize the limited nature of the Federal Government." Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 871 (1960). He repeated his assertions in his dissent in *Griswold v. Connecticut*, 381 U.S. 479, 519-20 (1965), but apparently ignored his 1960 statement that the use of the words "the people" in the ninth and tenth amendments "strongly emphasizes

conception. The first, which seems to pose the most dangerous threat to inherited goal-values today, would affirm that the unenumerated rights are the equivalent of a constitutional scheme which grants and withholds federal powers. The second derivation would affirm that unenumerated rights do exist, but that they are only "rights" against the power of the federal government and are not inherent rights of man which exist against the state governments or the conduct of other men outside of government. For convenience, these two positions will be referred to as the "constitutional scheme approach" and the "non-inherent rights approach," respectively.

1. *The "Constitutional Scheme Approach"*

Under the "constitutional scheme approach," the "rights" that are retained are equivalent to the remaining "powers"—*i.e.*, those not granted to the federal government—which, in the abstract, are few indeed. And, the adherents to this misconception would argue, there are no rights except those which relate to the governmental process, so the whole knotty question of the difference between rights and powers simply disappears.

This approach reveals an underlying dependence upon an unquestioned assumption that where the federal government possesses a "power" it is held in the absolute—that the interests of the government are to prevail whenever they are balanced against individual interests, whether the individual efforts are joint or separate.²³ It is not an assumption which is easily perceived, especially when the misconceivers blur the distinctions between "power" and "rights"; but if one seeks to explore the imposed construct of "power" and "right" a bit further, one runs ultimately into an overall question of authority, since none of the adherents openly proclaims that the holders of governmental positions can govern the rest of us, and presumably themselves, with raw power. Each identifiable adherent is concerned with granted or authorized power, that is, delegated authority. They are not really concerned with "rights," but seek to identify a retained authority of the

the desire of the Framers to protect individual liberty." Black, *supra* at 871. Justices Goldberg and Brennan specifically disagreed with Justice Black's views on the purpose of the ninth. *Griswold v. Connecticut*, 381 U.S. 479, 488-93 (concurring opinion).

²³ This conclusion was expressed by Justice Reed in *United Public Workers of America v. Mitchell*, 330 U.S. 75, 96 (1947). It has been criticized, however, as "an unfounded basis for the dominance of the central government." See Ringold, *The History of the Enactment of the Ninth Amendment and Its Recent Development*, 8 TULSA L.J. 1, 13 (1972) and references cited therein.

people. They assume, rather simply, that when some authority for a particular governmental function has been delegated, then that is the end of the question. Nothing needs to be balanced since, it is assumed, authority was given up—*i.e.*, not conditionally granted or mutually held. Any authority that was not given up is what the ninth amendment refers to, not some notion of “right” outside of a hierarchy of governmental and nongovernmental “power.” But if there had been no difference between retained rights and retained powers, there would have been no need for the ninth amendment at all, since the tenth amendment had already recognized a retained power in the people.²⁴ Furthermore, this sort of misconception hinges upon a dangerous blurring of the distinction between delegated *competence* to make authoritative decisions—*i.e.*, power—and the legal *policies* which are at stake—*i.e.*, shared policies or expectations of the existence of “rights” and “duties.” Contrary to this interpretation of the ninth amendment, competence is not at all the same as “right”; and a delegated power of decision is not the same as a set of policies which should guide rational decision.

To put it bluntly, this misconception opens the door to a false, totalitarian, and subversive concept of authority—*i.e.*, that authority exists with the government and not with the people.²⁵ It may be difficult for some to accept in this age of the super-industrialized or “machine” society an increasing deference to conformity and power, and the lessening value of the individual—if not an outright rejection of the value of certain persons and ideas as “marginal” or superfluous²⁶—but the Framers of our own Constitution rejected

²⁴ See note 31 and accompanying text *infra*.

²⁵ This misconception has allowed the growth of totalitarianism and “machine” oriented societies in several nations of divergent ideological background. See generally H. ARENDT, *TOTALITARIANISM* (1968); G. TUNKIN, *CONTEMPORARY INTERNATIONAL LAW* 32, 164, 167 (G. Ivanor-Mumjiev transl. 1969) (adopting view of Engels and nineteenth century positivists that authority comes from “will of the state” and “will of [the] ruling class”). See also E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 1-9, 11-12 *passim* (1948); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 75-97 *passim* (reprint 1968); H. MARCUSE, *SOVIET-MARXISM—A CRITICAL ANALYSIS* (1961); Paust, *The Nuclear Decision in World War II—Truman’s Ending and Avoidance of War*, 8 INT’L LAW. 160, 182 n.91 (1974). This false concept of authority has a background in the rise of industrialization, nation-state power, and legal positivism in the nineteenth century. See sources cited in this note and note 18 *supra*. Professor McDougal’s challenging alternative, a theory of law appropriate to a free society, seems aptly expressed by the title of an earlier work: *Jurisprudence for a Free Society*, 1 GA. L. REV. 1 (1966).

²⁶ See H. MARCUSE, *supra* note 25; N.Y. Times, Oct. 13, 1974, § 1, at 34, col. 1, 4; *id.* Oct. 3, 1974, § 1, at 2, col. 4; *id.* Sept. 27, 1974, § 1, at 1, col. 6; *id.* Sept. 15, 1974, § 4, at 4, col. 3. See also T. GURR, *WHY MEN REBEL* 46-50, 63 *passim* (1970); S. MILGRAM, *OBEDIENCE TO AUTHORITY* (1974) (unfortunately equating authority with power).

the view that authority comes from the government. The believed that all authority is derived from the people and that primary authority, which remains in the people, is at all times superior to representative authority.²⁷ How unnatural it would have been to even suggest that a sovereign king or a president was beyond the law, that he could protect himself, or any violator of criminal law, from punishment by arbitrary methods or by the mere referral to the nature and power of an office, or that he could obstruct the administration of justice and the due process of government at his own discretion.²⁸

Indeed, in the Declaration of Independence these very sorts of attempts to usurp authority or to obstruct what was considered to be the proper functioning of the criminal process were specified in charges against the King of England. And it was not accidental that the King was denounced, for this and similar conduct, as a "tyrant" and as "unfit to be the ruler of a free People."²⁹ With these charges in mind, those who formulated the Declaration of Independence expressly declared that governments are constituted in order "to secure" the inalienable Rights of Man, that governments derive "their just powers from the consent of the governed," and that "it is the right of the people to alter or abolish" any form of government which "becomes destructive of these ends."³⁰

The preamble of the Constitution declares that "WE, the people . . . do ordain and establish this Constitution." It does not say "we the states," "we the super magnanimous elite," or "we the sycophantish bureaucracy." It is no mishapenstance that the tenth amendment expressly refers to the retained *power* of the people, as well as that of the states, and the ninth amendment expressly refers to the retained *rights* of the people.³¹ In fact, Thomas Paine, in a

²⁷ By "representative" authority, the author means the delegated and authoritative competence to make decisions that is conditionally granted by the people to the legislative, the executive, and the judicial branches of the government. See Paust, *supra* note 16.

²⁸ The need for legislative consent has been expressly declared throughout the constitutions and resolves of this country, its states, and early English law. See DECLARATION OF INDEPENDENCE (1776); DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775); DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (1774); ENGLISH BILL OF RIGHTS (1689); DEL. DECLARATION OF RIGHTS § 7 (1776); MD. CONST. § 7 (1776); MASS. CONST. art. 20 (1780); PA. CONST. & DECLARATION OF RIGHTS (1790); VA. CONST. § 7 (1776). These documents have all been reprinted in SOURCES OF OUR LIBERTIES (R. Perry & J. Cooper eds. 1972).

²⁹ DECLARATION OF INDEPENDENCE (1776).

³⁰ *Id.*; see DEL. DECLARATION OF RIGHTS §§ 1, 4, 5 (1776); MD. CONST. §§ 1, 2, 4 (1776); MASS. CONST. preamble, pt. I, arts. 1, 4, 5, 7 (1780); N.H. CONST. pt. I, arts. 1, 2, 7, 8, 10 (1784); N.C. CONST. §§ 1, 2 (1776); PA. CONST. §§ 4, 5 (1776); VA. CONST. § 3 (1776).

³¹ See U.S. CONST. amend. IX, X; DEL. DECLARATION OF RIGHTS § 5 (1776); MD. CONST. § 4 (1776); MASS. CONST. preamble, pt. I, arts. 1, 4, 5, 6, 7 (1780); N.H. CONST. pt. I, arts. 1,

widely circulated book, *The Rights of Man*, exposed the basis of the distinction and the inherited expectations of our Forefathers when he wrote that the "authority of the people" is "the only authority on which government has a right to exist in any country."³² Paine emphasized that the "end of all political association is the preservation of the natural and imprescriptible rights of man . . ." and that the government "has of itself no rights: they are altogether duties."³³

How jarringly inappropriate would have been the argument, then, that when the executive had decided that a particular criminal investigation or prosecution should not continue because it was claimed to be contrary to "governmental interests," a court could not at all interfere and a people should not complain. In fact, the expectation of the contemporary framers of state constitutions was clear: if any laws were to be suspended or their execution curtailed, it was to be the legislative branch and not the executive which would make such a decision. Moreover, the decision to suspend investigation, prosecution, or execution of the law is not at all synonymous with the competence to grant a pardon after conviction.³⁴ Further, to equate "governmental interests" with the consent of the governed, the interests of the people, the objective and just administration of the criminal law, or the constituted and independent judicial power of the courts would have been not only unacceptable but also unthinkable.

Recently, however, claims were openly made that in the sphere

2, 7, 8, 10 (1784); N.C. CONST. § 1 (1776); PA. CONST. §§ 1, 5, 6 (1776); VA. CONST. §§ 1, 2 (1776); VT. CONST. preamble, §§ 1, 5, 6, 7 (1777). A reading of these state constitution provisions discloses that the thought of that period distinguished between "inherent rights" belonging to every person, which cannot be divested, and the primary "power" of the people, which can be exercised in "trust" by governmental representatives for the common benefit, protection, and security of the whole community. Moreover, it should be noted, in the eighteenth century it was customary to attach great importance to preambles as declarations of general goal values sought by the relevant community.

³² See T. PAINE, *THE RIGHTS OF MAN* pt. 1, at 8 (1794).

³³ *Id.* pt. 1, at 122, pt. 11, at 30; see D. MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 158 (1951) [hereinafter cited as MALONE]. Malone quotes Jefferson's remark that the "opinion of the people" is the "basis of our governments" as a reason why Jefferson felt that the authority of a constitution and law must be dynamic and reflect currently shared expectations. See note 62 *infra*.

³⁴ See DEL. DECLARATION OF RIGHTS § 7 (1776); MD. CONST. declaration of rights, § 7 (1776); MASS. CONST. pt. 1, art. 20 (1780); N.H. CONST. pt. 1, art. 29 (1784); N.C. CONST. declaration of rights, § 5 (1776); VA. CONST. bill of rights, § 7 (1776). Section 2 of article 11 of the United States Constitution allows the President to pardon offenses against the United States, but "he cannot exempt anyone from the law" or, it seems, the reach of the judicial process, except by pardon. See E. CORWIN, *supra* note 13. Concerning the controversial pardon of Mr. Nixon, see N.Y. Times, Sept. 9, 1974, at 1, col. 4.

of delegated powers, or conditionally granted authority, the "governmental interests" are the same as or superior to the interests of the people, and that it is only by protecting "governmental interests" that we best serve the nation.³⁵ To this sort of claim, the drafters of nearly all of the state constitutions that had been written prior to the enactment of the United States Constitution aptly expressed the following reply:

[G]overnment is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community; And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.³⁶

Supplementing this declaration was the widely shared expectation that when government is administered for the benefit of "those who are employed in the legislative and executive business . . . the people have a right . . . to reduce their public officers to a private

³⁵ This argument was made by former President Nixon's lawyers in the dispute with then special prosecutor Archibald Cox over the surrender of Watergate-related tapes. See N.Y. Times, Aug. 18, 1973, § 1, at 13, col. 1. The President's brief also stated that it "is not true" that the "authority of the grand jury is derived from the people themselves," as the Cox brief declared. *Id.* As stated in this Article, the contrary understanding prevailed nearly 200 years ago, when it was declared that all governmental authority is derived from the people and that all governmental functioning—not only that of the grand jury, the public prosecutor, the courts, and the legislature, but also that of the President—must be in the people's interest and must be accounted for to them. Moreover, to allege that a compromise between the consent of the people and the will of one branch of the government is necessary in order to avoid "constitutional crises" is not only a self-serving justification for unilateral control, but an affront to our inherited values and a mockery of authority and constitutional order. Happily, the Supreme Court seems to have partially rejected most of these types of claims in the context of Richard Nixon's confrontation with the courts, the Congress, and the American people. See *United States v. Nixon*, 94 S. Ct. 3090 (1974) (unanimous opinion, Rehnquist, J., not participating); N.Y. Times, Aug. 26, 1974, § 1, at 11, col. 1 (House Judiciary Committee's Articles of Impeachment); *id.*, Aug. 4, 1974, § 4, at E2, col. 3. Even more alarming than the attempt to juxtapose "governmental" interests with the common interests of the people were Mr. Nixon's attempts to stop the Watergate investigation and prosecution by the Department of Justice in April 1973, because it would be "dangerous to the Presidency." Hersh, *Nixon Warned the Justice Department Against Inquiry On His Watergate Role*, N.Y. Times, May 2, 1974, at 1, col. 5.

³⁶ PA. CONST. declaration of rights § 5 (1776). Other state constitutions have similar provisions. See, e.g., DEL. DECLARATION OF RIGHTS §§ 1, 5 (1776); MD. CONST. declaration of rights, § 4 (1776); MASS. CONST. preamble, pt. 1, art. 7 (1780); N.H. CONST. pt. 1, arts. 1, 8, 10 (1784); VT. CONST. ch. 1, §§ 5, 6, 7 (1777); VA. CONST. bill of rights, § 3 (1776). See also DECLARATION OF INDEPENDENCE (1776); DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775); U.S. CONST. art. 1, § 1 (Presidential emolument); N.C. CONST. §§ 1, 3 (1776); N.Y. Times, Jan. 19, 1974, § 1, at 30, col. 8 (letter to the editors).

station, and supply the vacancies by certain and regular elections."³⁷ Thomas Paine had expressed the contemporary view on reformation of the federal government, while also recognizing the right of removal from office. He declared that "[t]he right of reform is in the nation in its original character, and the constitutional method would be by a general convention elected for the purpose. There is moreover paradox in the idea of vitiated bodies reforming themselves."³⁸ No man or group of men was to be above the law. Public interests were to be the measure of public decisions, and authority (just power) was to be derived from and ultimately retained by the people. As Hamilton expressed so well: "[T]he people surrender nothing."³⁹

This not only meant that delegated, or representative, authority was subject to the ultimate authority of the people, but that delegated authority was subject to retained "rights," including evolving expectations of rights involving all social interactions, and to a retained "power"—*i.e.*, a competence to act, or an authority of the people to restrict, alter, or abolish governmental institutions. In sharp contrast, the exponents of the second misconception—that the ninth merely cut back on federal powers—affirm that the people *have* surrendered their rights. They seem to place primary reliance upon a statement by Madison that "if a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing."⁴⁰ Thus, they conclude, there are no "rights," and Madison was only concerned with the reduction of federal power, not with the protection and implementation of rights which were not specifically enumerated elsewhere. To reiterate, this approach necessarily ignores the language of the ninth amendment or would, at least, affirm that the ninth amendment contains language without meaning.

Retained powers and the efficacious protection of rights may have seemed synonymous in the eighteenth century, but this view

³⁷ PA. CONST. declaration of rights § 6 (1776).

³⁸ T. PAINE, *supra* note 32, pt. I, at 44. A current statement of a related interest has been made by ABA President Chesterfield Smith that "it would be improper for an investigation of the President himself, of the office of the President, or of the executive branch of the Federal Government to be conducted by a prosecutor subject to the direction and control of the President." See Smith, *The Constitutional Crisis*, N.Y. Times, Oct. 23, 1973, § 1, at 47, col. 2. Cf. MALONE 158, quoting 4 WRITINGS OF THOMAS JEFFERSON 359 (P. Ford ed. 1899). Jefferson believed that "[t]he people are the only censors of their governors"

³⁹ THE FEDERALIST No. 84, at 578 (J. Cooke ed. 1961) (A. Hamilton).

⁴⁰ Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 822 n.36 (1966), quoting 5 WRITINGS OF JAMES MADISON 431-32 (G. Hunt. ed. 1904); see *id.* at 825 n.47.

does not similarly compel us to leave to "nature" the protection of those same or other unenumerated rights in the twentieth century. The better view seems to be that Madison was interested in both rights and powers, but had thought that the rights of man were already adequately guaranteed, both by what had been specified and by the natural limits on federal power in the context of the preindustrial society of eighteenth century America. What the propounders of the misconception fail to mention, however, is the significant fact that the Madison statement was made in response to Governor Randolph of Virginia, who had prophetically criticized Madison's assertions that the ninth would provide sufficient protection for the rights of man. Randolph warned that there was "*no criterion* by which it could be determined whether any other particular right was retained or not."⁴¹ Therefore, the federal government might someday deny the existence of, or disparage, civil liberties that were not specifically listed in the Constitution with the self-deceiving statement that it could not find any criterion for their discovery.⁴²

Actually, Madison, like Hamilton and Justice Wilson, had himself feared that a specific enumeration of rights might someday be interpreted so as to deny or disparage others. But he was persuaded by Jefferson and the general demands of the states that a bill of rights should be added to the Constitution along with some form of caveat to cover the danger.⁴³ Indeed, according to one scholar, Madison did not juxtapose "implied powers against unenumerated rights. On the contrary, he indicated that he thought a line could be drawn between them."⁴⁴ Madison had stated, before

⁴¹ *Id.* at 822 n.36, quoting 4 J. SPARKS, CORRESPONDENCE OF THE AMERICAN REVOLUTION 298 (1855) (emphasis added).

⁴² In jurisprudence, this might be referred to as an "I see nothing—or nothing else—" approach.

⁴³ See Call, *Federalism and the Ninth Amendment*, 64 DICK. L. REV. 121, 125 (1960); Dunbar, *supra* note 21, at 629-31, 633-43; Rogge, *supra* note 18, at 789, 792. See also MALONE 168-79. It should be noted that Justice Wilson had been a member of the Constitutional Convention and Committee on Style. See *Ex parte Grossman*, 267 U.S. 87, 115 (1925). He was also a member of the court in *Henfield's Case*, an important precedent for federal court jurisdiction over violations of international law. See *Henfield's Case*, 11 F. Cas. 1099 (No. 6360) (C.C.D. Pa. 1793); Paust, *supra* note 9, at 9 n.10.

⁴⁴ Rogge, *supra* note 18, at 792. Madison had also stated, in a letter to Jefferson in 1788, that

[w]herever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

MALONE 176, quoting 5 WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1964).

the assemblage of the first House of Representatives, that the argument that a specification of some rights might someday be misinterpreted to imply a denial of others was the best argument he had heard against the enumeration of any rights in the Constitution, but he felt confident that his new proposal—the predecessor to the ninth—would sufficiently guard against such attempted abuses of right.⁴⁵ Madison knew that “no language is so copious as to supply words and phrases for every complex idea.”⁴⁶ He apparently knew that a list of words would be “inadequate to define all of the rights which man should possess in a free society.”⁴⁷ He expressed a view similar to that of Jefferson when he noted that a bill of rights could not guarantee even “the most essential rights” with “the requisite latitude.”⁴⁸ And he expressed his certainty “that the rights of conscience, in particular, if submitted to public definition would be narrowed much more than they are likely to be by an assumed power.”⁴⁹

With this recognition by a primary drafter of the Constitution that words or lists of words are imperfect symbols for a complete expression or “enumeration” of all societal expectations of the existence of rights or goal-values, it would seem incredulous to assume that the Framers felt that the first eight amendments contained all of the fundamental human values of their day,⁵⁰ operated only as a cut-back on federal powers, and would preclude the vitality of future values. Indeed, as one author correctly asserts, the ninth amendment specifies that certain *rights* exist and the tenth amendment specifies that certain *powers* remain, and it must

⁴⁵ See 1 ANNALS OF CONG. 435, 439 (1789) [1789-1791]. Specifically, Madison replied to the argument by stating that his proposals attempt to avoid abuses of right and that rights enumerated elsewhere in the Constitution were

not to be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such power, or as inserted merely for greater caution.

Id. at 435. Additionally, Madison's proposal seems to indicate that he was concerned with both rights and powers—not merely with a cutback on federal power. See also Kelsey, *supra* note 18, at 310; Dunbar, *supra* note 21, at 635; note 50 *infra*.

⁴⁶ THE FEDERALIST No. 37, at 236 (J. Cooke ed. 1961) (J. Madison).

⁴⁷ Redlich, *supra* note 12, at 811. See also Kelley, *supra* note 40, at 822-23; Kelsey, *supra* note 18, at 320.

⁴⁸ 14 PAPERS OF THOMAS JEFFERSON 18 (J. Boyd ed. 1958) (letter from Madison to Jefferson).

⁴⁹ *Id.* To Madison, the freedom of conscience was perhaps the most important right of all. Kelley, *supra* note 40, at 824; Redlich, *supra* note 12, at 806 n.91. Thomas Paine apparently also felt that some of the natural rights were “imperscriptible.” See T. PAINE, *supra* note 32, pt. 1, at 122.

⁵⁰ This is even more clear from the fact that 186 amendments were originally proposed, of which some 80 were the core. See Ringold, *supra* note 22, at 4, 6, 31.

be "evident that there was some distinction in the minds of the Framers of those amendments between *declarations of right* and *limitations on or prohibitions of power*," or the ninth would have been completely unnecessary.⁵¹ Indeed, Madison's stated concern with a "public definition" of the "rights of conscience," as opposed to "an assumed power," itself stands as evidence of his belief that rights and powers were entirely different aspects of an integrated constitutional process. Furthermore, to Madison, rights could exist in areas totally outside the province of government, and could become operable on an independent foundation, or one separate from the question of federal powers.⁵²

Although at times the concepts of rights and powers are very similar, it is important to consider how each is to be separately exercised. Therein lies a difference between the ninth amendment "rights" retained by the people and the tenth amendment "powers" retained by the states and the people, for it seems evident that the rights are to be exercised regardless of the retained powers or a retained competence to act and that these rights are to be secured for the people by all governmental bodies.⁵³ One holder of the

⁵¹ Kelsey, *supra* note 18, at 310. See Kelley, *supra* note 40, at 827. Kelley noted that "Madison was intent on clearly separating *rights* and *powers*." *Id.* (emphasis added). This can even be seen in one of Madison's proposals to Congress that the enumeration of rights "shall not be so construed as to diminish the just importance of other *rights* retained by the people, or as to enlarge the *powers* delegated by the Constitution." 1 ANNALS OF CONG. 435 (1789) [1789-1791] (emphasis added).

⁵² See Dunbar, *supra* note 21, at 635-37. By contrast, the author pointed out that James Wilson "had spoken of rights as 'powers reserved,' and this was a common usage of the time." *Id.* at 638.

Thomas Paine also made a distinction between rights and powers. Although still believing that many natural rights were protected by nature, Paine stated that "civil rights are those which appertain to man" in his relation to society and are those "to which his individual power is not, in all cases, sufficiently competent"; but he added that "natural rights which he retains, are all those in which the *power* to execute is as perfect in the individual as the right itself." See T. PAINE, *supra* note 32, pt. 1, at 39. Of course, Jefferson had sought a protection of the rights of man against any governmental encroachment, state or federal. See MALONE 153, 158, 168, 176. Paine's description of individual power, it must be remembered, was the power of an individual in an eighteenth century society.

⁵³ Of course, the Declaration of Independence itself contained this view, asserting that it is a "self-evident" truth that "all men" have "certain unalienable rights," that governments are to *secure* these rights, and that "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government." This jurisprudential outlook of the same men who would later frame the Constitution clearly evinces the distinction between inalienable rights and granted governmental powers, for although the government has been granted the power to act it must still guarantee and effectively secure these rights for "all men" while it functions. Clearly the *rights* are not to be diminished by grants of *power* to those governments.

Furthermore, the express declaration of the tenth amendment that "powers" are reserved to the people seems to imply the popular expectation that governments, when they

second misconception, Professor Redlich, discovered this difference between retained rights and powers,⁵⁴ but he was content to ignore its potential use in the discovery of a broad constitutional scheme for rights protection set up by the Framers. Quite curiously, he concluded that rights which were expressly retained "by the people" could be circumscribed by the states, though this could not be done by the federal government.⁵⁵

2. The "Non-Inherent Rights Approach"

The second argument derived from the misconception that the ninth amendment is a cut-back on the power granted to the federal government is based upon the notion that the rights of man which are expressly retained "by the people" were not so retained against another governmental entity set up by men—the states.⁵⁶ That this is nothing but a further misconception, however, is evident from the context in which our nation was founded and the popular expectations of authority and legal right. The American rebels had just expressed to the world that certain expectations were "self-evident" truths. Among these were the fundamental expectations that "all men" have "certain unalienable rights" and

deny the existence of these rights of man, or fail to secure them for the people, can be altered or dissolved by the people either peacefully or by revolution. See Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* § 135, in *SOCIAL CONTRACT—ESSAYS BY LOCKE, HUME, AND ROUSSEAU* 79 (E. Barker ed. 1962) [hereinafter cited as Locke, with page references to Barker collection]. It appears that "Madison was firmly convinced that the people were 'the only legitimate fountain of power' and the 'fountain of authority.'" Call, *supra* note 43, at 128, citing *THE FEDERALIST* Nos. 49, 51 (A. Hamilton). Judge Call properly criticizes language in *United Public Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947), to the effect that fundamental rights have been diminished to the extent of the constitutional grants of power to the federal government. Call, *supra* note 431, at 130. Kelley also criticized that language as emanating from "a basic misconception as to the meaning of the ninth amendment. . . . [I]n no case could [federal powers] transgress the limitations imposed by individual rights." Kelley, *supra* note 40, at 827. See also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). The Court in that case stated that there "can be no limitation on the power of the people of the United States." *Id.* at 236. Subsequent cases have reiterated this notion. See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 303, 324-26 (1816); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). *Ware v. Hylton* was also cited in *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1879), because, as we are told, "it show[ed] the views of a powerful legal mind of that early period, when the debates in the Convention that framed the Constitution must have been fresh in the memory of the leading jurists of the country." *Id.* at 489.

⁵⁴ Redlich, *supra* note 12, at 807.

⁵⁵ *Id.* at 805-06, 808. Redlich added that the fourteenth amendment applied those restrictions to the states in 1868.

⁵⁶ See, e.g., Kelley, *supra* note 40, at 815. *Contra*, B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 36 (1955).

that *all* governments are created "to secure these rights"—not to ignore them or to be immune from the express duty to protect and secure them for the people.⁵⁷ In view of this historic declaration, it makes little sense to postulate that the state governments, set up by these same men after the American Revolution, were to be permitted to circumscribe the fundamental rights of man. It would be more accurate to assume that these rights were to be recognized, respected, and protected by all governments or branches of government that these men would create.

Indeed, Jefferson had written to Madison that "a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inferences."⁵⁸ The state of Virginia had ratified the Constitution with an "impression," or a disclosed understanding, that certain "essential and unalienable rights of the people" remained.⁵⁹ And this expectation of a continued existence of the rights of man, enforceable even against the state, although they are not enumerated in state constitutive instruments, must have been commonly held, since the people of several states found no need at all to specify that even one right of the people continued to exist after the formation of the state government.⁶⁰

In fact, the application of the ninth amendment to the states would have been completely consistent with the general expectations of the Founders pertaining to the relationship between governments and the rights of men. This is evident in their early writings and is expressly recognized in several of the early state constitutions⁶¹ which affirm that state governments are bound by the rights of man, not only in the sense that these rights constitute a restraint upon state power but also in the sense that rights of man and the public interest shall guide the governmental functionaries in proper governmental decision-making and require action to promote these rights. The earliest constitution, that of Virginia, had clearly expressed these expectations; it also declared that "all men are by nature equally free and independent, and have certain

⁵⁷ DECLARATION OF INDEPENDENCE (1776). See notes 30, 31, 32 & 36 *supra*.

⁵⁸ 4 WRITINGS OF THOMAS JEFFERSON 477 (P. Ford ed. 1894).

⁵⁹ Kelsey, *supra* note 18, at 314-15.

⁶⁰ See Kelley, *supra* note 40, at 816 n.10. See also B. WRIGHT, AMERICAN INTERPRETATION OF NATURAL LAW 112-14 (1962). The states were: Connecticut, Georgia, New Hampshire, New Jersey, New York, and South Carolina. It does not seem plausible that the people had no fundamental rights in these states merely because none were specifically enumerated.

⁶¹ See note 62 *infra*.

inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity."⁶²

Since the natural, essential, inherent and inalienable rights of man were binding on the states by express recognition in most of the state constitutions, their recognition in the ninth amendment must have been, as Jefferson would declare, rights "against every government on earth" and "what no just government should refuse."⁶³

Moreover, as even such proponents of the second misconception as Professor Kelly recognize, "[a]t the time the Constitution was drafted, nearly every political leader in the country was a disciple of the natural law" school of juristic thought and was greatly influenced by the writings of Locke and Coke.⁶⁴ These juristic expectations of the day, as Kelly notes, held that the natural

⁶² VA. CONST. bill of rights, §§ 1, 2, 3 (1776). The contemporaneous view of the Founders was that the dead cannot bind the living, that authority and laws derive their being from the consent of the living, and that, as Thomas Paine stated, "[e]very generation is and must be competent to all the purposes which its occasions require." See T. PAINE, *supra* note 32, at 8, 11 *passim*. Jefferson has been quoted on the axiom of natural law as saying "that the earth belongs in usufruct to the living," and that "[e]very constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right." MALONE 179. Thus, authority exists in the living. It has also been said that "[w]hen decisions are authoritative but not controlling, they are not law but pretense; when decisions are controlling but not authoritative, they are not law but naked power." Lasswell & McDougal, *supra* note 16, at 384.

The constitutions of Pennsylvania and Vermont repeated this expectancy while adding that the inherent rights were natural and inalienable. PA. CONST. declaration of rights, § 1 (1776); VT. CONST. ch. I, § 1 (1786). Similarly, the constitution of Massachusetts referred to "certain natural, essential, and unalienable rights" (MASS. CONST. pt. 1, art. 1 (1780)), while the constitution of New Hampshire referred to "certain natural, essential, and inherent rights." N.H. CONST. pt. I, arts. 2, 4, 5 (1784); *cf. id.* art. 3. And the contemporaneous reference to the "invaluable rights of man" appeared in the Pennsylvania Declaration of Rights of 1790. See SOURCES OF OUR LIBERTIES, *supra* note 28, at 327. This expression of the "rights of man" was used by Jefferson, Paine, and others as well. See, e.g., T. PAINE, *THE RIGHTS OF MAN* (1792). It had an earlier synonym in the liberties and free customs of man. For a documented development of the expression, see SOURCES OF OUR LIBERTIES, *supra* note 28, at 17, 26, 74, 101.

⁶³ See note 58 and accompanying text *supra*.

⁶⁴ Kelley, *supra* note 40, at 815; see E. CORWIN, *supra* note 13, at 2, 132; Corwin, *supra* note 14, at 153, 394-96, 399; Franklin, *The Relation of the Fifth, Ninth, and Fourteenth Amendments to the Constitution*, 4 HOW. L.J. 170, 174 (1958); Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121, 125 (1967); Kauper, *The Higher Law and the Rights of Man in a Revolutionary Society*, lecture at A.E.I. bicentennial series, Old North Church, Boston, Mass., Nov. 7, 1973. See also *Henfield's Case*, 11 F. Cas. 1099, 1107 (No. 6360) (C.C.D. Pa. 1793) (interesting charge to jury by Justice Wilson, former member of Constitutional Convention, declaring law of nature obligatory on individuals and all state citizens still subject to all obligations owed universal society of human race); DECLARATION OF INDEPENDENCE, preamble (1776) (reference to "Law of Nature").

rights of men "were inalienable . . . could not be affected by governmental action . . . [and] could not be given up and were not subject to constraint by the political authority which men established."⁶⁵ But later in his article Kelly concluded that the states could subjugate these same human values and that federal courts could not protect them unless they were enumerated somewhere in the Federal Constitution or could somehow fit under the "due process" clause. In view of the naturalist philosophy, this interpretation would not have been possible, since even the "due process" concept seems limited by its terms to some governmental process. And to the naturalist-oriented Framers, these rights of man simply could not be given up, nor could they be subject to constraint by the political frameworks which men created, whether these frameworks happened to be state or federal.⁶⁶

Professor Redlich, however, completely misconstrues the nature of these juristic expectations. He tries to argue that the states must not have been restrained at all, by repeating an unsupportable myth that "men looked to the states as the chief guardians of individual rights" and not to themselves.⁶⁷ But even this statement, that the states were to be "guardians" of these rights, implies that the states cannot abrogate them and that the rights must be protected if some entity of the state attempts to deny or disparage them, for the "guardian" of rights, by definition, must guard against their denial or disparagement from any source. Redlich also argues that it would be "unrealistic to attribute . . . an intent to impose ill-defined legally enforceable restraints on the states in light of" a rejection of some of Madison's proposals for additional amendments.⁶⁸ But the relevance of this argument seems hidden

⁶⁵ See Kelley, *supra* note 40, at 816.

⁶⁶ *Id.*; see Locke 79. Locke had concluded: "Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must . . . be conformable to the law of nature. . . ." *Id.* See also WRITINGS OF THOMAS JEFFERSON, *supra* note 58; *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (contemporary view); Kauper, *supra* note 64; note 58 and accompanying text *supra*.

⁶⁷ Redlich, *supra* note 12, at 808; see *id.* at 806. Professor Kauper emphasizes that, significantly, many state constitutions contained declarations of right as proof that state constitutions did not create these rights, but recognized them. Kauper, *supra* note 64.

⁶⁸ Redlich, *supra* note 12, at 806. Professor Redlich's curious reasoning largely ignores the naturalist fears of all governments (*but see id.* at 807), and the premise that governments are created for men—not men for governments. The ninth does not even mention the state; it declares that these rights are reserved to "the people." See *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 662-63 (1874). That case stated that there are reserved individual rights which are beyond the control of the state—otherwise we would have no restraints on the majority and we would suffer the "despotism of the many." See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 303, 324-27 (1816); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388

and, perhaps, relates to the confusion between grants of power and the retention of rights which the holders of this misconception seem to share.

What emerges from the expectations of the Framers disclosed above is a scheme of rights and powers that can be articulated briefly. First, ultimate authority comes from the people, the aggregate of a full and free sharing and shaping of power by all individuals.⁶⁹ Some of this authority is delegated conditionally by the people to governmental entities and becomes representative authority through a dynamic process that constitutes the governmental structure and its sub-processes. With the conditional transfer of this authority, there is the creation of authoritative "power"—i.e., competence—in the governmental entities to the extent so constituted; but the persons entrusted with governmental powers are the trustees and servants of the public and they remain fully accountable to the public. Second, when the federal government was constituted, certain state powers were also retained for a comprehensive system of authoritative government. Third, the proper function of all government, that is, the purpose and condition of the grant of authority and power, is to secure the rights of the populace. Fourth, certain fundamental rights of the populace, both joint and individual, are expressly recognized in both federal and state constitutive instruments, but others that are not enumerated are expressly retained by the people, as an aggregate of all individuals, *despite* the transfer of a certain measure of authority and power to the constituted governmental entities.⁷⁰

(1798). *But see* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The misconceptions were expressed later in *Barron*, and have been properly criticized by scholars. *See, e.g.*, B. PATTERSON, *supra* note 56, at 13, 37; Ringold, *supra* note 23, at 16, 24. At least one author has also noted that holders of this view seem to confuse rights and powers. *See* B. PATTERSON, *supra* note 56, at 37-41; Ringold, *supra* note 23, at 24 n.57.

⁶⁹ This notion of authority, that "the individual human being as the ultimate unit of all law rises sovereign over the limited province of the State," also finds acceptance in the international law of human rights and has a long history of affirmation and development. *See, e.g.*, H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 27, 34-35, 120, *passim* (1968 reprint); McDougal & Bebr, *supra* note 8, at 603-06, 608. Here one should recall the transnational significance of Thomas Paine's statement that the authority of the people is "the only authority in which government has a right to exist in any country." T. PAINE, *supra* note 32, at 85.

⁷⁰ In fact, as stated, that transfer is conditioned upon the continuous fulfillment of rights—a fact which relates to the full meaning of "authority" and which is of increasing significance to the expansion of Presidential powers, the relative aloofness of certain Congressional perspectives, the continued entrenchment of a fourth branch of government, bureaucracy, and the diminishing effort expended by the judiciary for the promotion of human dignity and the maintenance of an ideological or policy matrix for which our forebears fought and which is, truly, still at issue around the globe.

C. *The Rule of Construction and the Fifth and Fourteenth Amendments Arguments*

The third main argument against a broad role for the ninth amendment in the guarantee of fundamental human values and liberties is the notion that the ninth was adopted merely as a "rule of construction" for interpretation of the rest of the Constitution.⁷¹ Some of the holders of this misconception add, however, that the ninth is useful in "pointing" to the utility of the "due process" clauses of the fifth and fourteenth amendments.⁷² This "supplemental" view is actually the foundation for the fourth main argument against greater use of the ninth: that the ninth is now of little importance since the fifth and fourteenth can cover the field.⁷³ But, as noted, the phrase "due process" seems limited to some form of governmental activity.⁷⁴ Although a comprehensive approach would not be entirely limited to restrictions upon actions of governmental bodies, because a *due* process of government would also entail the promotion of the rights of man in view of the fundamental expectation that government is constituted in order to "secure" these rights against infringement, regardless of the source of infringement. Even then, however, the "due process" language may not be broad enough to guarantee the effective observance and protection of fundamental human rights in ongoing social processes, as the broad language of the ninth amendment seems to require. Moreover, these two misconceptions not only ignore the plain fact that the term "others" in the ninth amendment must refer to rights *other* than those found within the first eight amendments, or to rights other than the specifically enumerated rights—such as the right of "due process," but they also ignore the nature of the jurisprudential expectations of the Framers and the human context which existed at the time of the adoption of the ninth amendment. Professor Kelley illustrates both of these misconceptions in stating that the ninth amendment is

⁷¹ See, e.g., E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 63-64 (1957); 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 651 (5th ed. 1905); Call, *supra* note 43, at 129-30; Dunbar *supra* note 21, at 641-43; Franklin, *supra* note 64, at 170 & 177; Kelley, *supra* note 40, at 825; Comment, *Unenumerated Rights—Substantive Due Process, the Ninth Amendment, and John Stuart Mill*, 1971 *Wis. L. Rev.* 922, 930 (1971).

⁷² See, e.g., Kelley, *supra* note 40, at 815.

⁷³ See, e.g., *id.*; Kutner, *supra* note 64, at 134-35; and Comment, *Wis. L. Rev.*, *supra* note 71, at 931, 936 (due process and ninth amendment are not "coequal"). See also *Griswold v. Connecticut*, 381 U.S. 479, 481-84 (1964).

⁷⁴ See, e.g., E. CORWIN, *supra* note 13, at 124 (equating "due process" with limits on "governmental powers"); *id.* at 143 ("state action" doctrine); p. 250 *supra*.

only a rule of construction . . . not the source of these rights, nor is it a vehicle for protecting them. Rather, it points to other parts of the Constitution—particularly the due process clauses of the fifth and fourteenth amendments—as the contexts within which unenumerated rights are to be determined.⁷⁵

Although it is true that the ninth is not the *ultimate* source of these rights, Kelley's other statements are clearly wrong on at least two counts: (1) the ninth does not "point" to the fifth or any other amendment, but is expressly detached from the specific language of any of them; and (2) it certainly could not have pointed to the fourteenth since that amendment did not come into existence for another seventy-nine years. The express detachment from the specific language of any other amendment seems to mean that the ninth was adopted not as a mere "rule of construction" of the enumerated rights or the other provisions of the Constitution, but as a *recognition* of the existence of "others" not listed.⁷⁶ The ninth is also an express *command* that these rights are not to be denied or disparaged merely because they are not enumerated in the Constitution.

III

THE UNENUMERATED RIGHTS PROTECTED BY THE NINTH AMENDMENT

There should be no debate as to whether fundamental rights of man exist; there should merely be inquiries concerning the proper identification of the boundaries and content of those rights. In our juristic records there have been demonstrations of certain views *about* these rights. There have been statements that the first ten amendments did not create new rights but provided a constitutional scheme for the guarantee of older, and indeed ancient, rights of the people.⁷⁷ The view has been expressed that the Bill of Rights includes those rights "arising out of 'Natural Laws,' 'inherent' in the structure of any society, or at least any civilized

⁷⁵ Kelley, *supra* note 40, at 815.

⁷⁶ See *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting) (ninth amendment may well include right to education, to work, and to recreation); *Griswold v. Connecticut*, 381 U.S. 479, 488-93 (1964) (Warren, C.J., & Goldberg & Brennan, JJ., concurring) (ninth amendment protects right to privacy in marriage); *Reid v. Covert*, 354 U.S. 1, 6 (1957) (rights and liberties not protected by "custom and tradition alone," implying that they *are* protected by custom and tradition or by inherited expectations of right and liberty). Furthermore, as we have noted, Kelley recognized that these rights of man are inalienable. Kelley, *supra* note 40, at 816, 823. Inalienable rights must exist in spite of the Constitution—not merely because of its language.

⁷⁷ See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897); *Weimer v. Bunbury*, 30 Mich. 201, 214 (1874).

society,"⁷⁸ and that these retained rights of men are "natural, inherent, and fundamental rights."⁷⁹ Other descriptions of these human expectancies have been couched in terms of "the traditions and conscience of our people,"⁸⁰ or shared values which can gain content for rights identification from specific guarantees and from an ongoing "experience with the requirements of a free society."⁸¹ And it has been said that "all rights in the Constitution are really human rights, since they are exercised by human beings against human beings."⁸²

In the past, courts have not merely used American values to discover the content of these rights, but have also used a test based upon a dynamic and "universal sense of justice,"⁸³ something "universally thought,"⁸⁴ the unanimity of the civilized nations of the world,⁸⁵ the international "custom of war,"⁸⁶ and norms of "human rights" law.⁸⁷ Indeed, many commentators have considered that international human rights, as they are found to have a universally shared content, are "the main core of rational objectives not only of the United Nations but of all democratic government."⁸⁸ What is

⁷⁸ L. HAND, *THE BILL OF RIGHTS* 2 (1958); see Wright, *Conflicts of International Law with National Laws and Ordinances*, 11 AM. J. INT'L. L. 1 (1917). Wright notes that there have been dicta in United States courts to the effect that statutes in conflict with natural law are void. *Id.* at 9.

⁷⁹ Note, *supra* note 20, at 106; see Corwin, *supra* note 14, at 152-53.

⁸⁰ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see *Griswold v. Connecticut*, 381 U.S. 479, 493 (1964); *Malinski v. New York*, 324 U.S. 401, 417 (1944) (Frankfurter, J., concurring).

⁸¹ *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting); see *Griswold v. Connecticut*, 381 U.S. 479, 493 (1964) (Warren, C.J., & Goldberg & Brennan JJ., concurring). For a discussion of related standards to test the evolving meaning of rights, see case cited note 89 *infra*. See also cases cited in Ringold, *supra* note 23, at 25, 37-38 *passim*.

It has been recognized that the criticism of judicial use of the ninth, based on a fear of engaging in arbitrary decision-making, is, at best, naive since it ignores the fact that the first eight amendments are sufficiently broad that they are also subject to the same judicial abuse of interpretative power. Kuter, *supra* note 64, at 130, 133; see M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967); Branden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571 (1948).

⁸² Z. CHAFFEE, *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 1 (1952).

⁸³ *Betts v. Brady*, 316 U.S. 455, 462 (1942).

⁸⁴ *Robinson v. California*, 370 U.S. 660, 666 (1962).

⁸⁵ *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

⁸⁶ *Wilkerson v. Utah*, 99 U.S. 130, 134 (1879).

⁸⁷ *Rochin v. California*, 342 U.S. 165, 169 (1952); *Palmigiano v. Travisano*, 317 F. Supp. 776, 785 (D.R.I. 1970); see *Furman v. Georgia*, 408 U.S. 238, 320 (1971) (Marshall, J., concurring); *id.* at 257, 270-71 (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 100 (1956). See also *Oyama v. California*, 332 U.S. 633, 673 (1948); *Namba v. McCourt*, 185 Ore. 579, 604, 204 P.2d 569, 579 (1949).

⁸⁸ McDougal & Leighton, *supra* note 7, at 60; see McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683, 708 (1950); Wright, *Toward a Universal Law for Mankind*, 63 COLUM. L. REV. 435 (1963).

surprising, however, is not that this interrelationship between human rights and the ninth amendment exists, but that it has to be explained at all in the twentieth century.⁸⁹

We sometimes forget that certain rights and values did not have to be enumerated with particularity in the eighteenth century, but could be covered by the general language in the ninth. Those rights and values were almost "guaranteed" by the expectations of the people and man's environmental context—they were "natural" rights of man and "self evident" truths. As Bertrand Russell disclosed, the "eighteenth-century doctrine of natural rights is a search for Euclidean axioms in politics," by which it "appeared to be possible to discover things about the actual world by first noticing what is self-evident and then using deduction."⁹⁰ Sir Hersch Lauterpacht added:

From the very inception the theories of natural law were generalizations from actual experience. They were attempts to put in the form of general law the fact of a uniformity as ascertained by observation and study of evidence Their authors endeavoured to form laws of conduct by reference to the nature of man, to his physical and mental constitution as they saw it, and to his station and purpose in the scheme of creation as they perceived it from the contemplation of the world around them.⁹¹

Moreover, as Lauterpacht pointed out,

The authors of the Declaration of Independence referred to its principles as expressive of self-evident truths. There is, in that confident application of the Euclidian principle of self-evident truths to the notion of natural rights of man, an assertion, which is far from being arbitrary, of a direct relation between natural rights and scientific laws.⁹²

Hamilton had stated that the "sacred rights of mankind are not to be rumaged for among old parchments or musty records"—a favorite sport of the later legal "positivists"—but "are written, as with a sunbeam, in the whole volume of human nature."⁹³ But as

⁸⁹ See B. PATTERSON, *supra* note 56, at 2-3. By 1955 the ninth had "heen invoked by litigants as a defense of human rights only ten times in our entire jurisprudence." *Id.* The use of the ninth has not succeeded since, either, except in a partial recognition in *Griswold*, 381 U.S. at 484.

⁹⁰ B. RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 36 (1945). The eighteenth century has also been described as the era of "rational humanism" which was an historic foundation for the development of documented international human rights. See, e.g., E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 12-13 (1964); McDougal & Bebr, *supra* note 8, at 604-06.

⁹¹ H. LAUTERPACHT, *supra* note 25, at 98.

⁹² *Id.* at 101.

⁹³ *Id.* at 101 n.11, quoting J. ACTON, *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 587

technological and sociological developments altered the human context and precipitated new human needs or affected old ones, those "natural" guarantees sometimes lost their effect or disappeared. If we are to guarantee to ourselves and our children these inherited values and the fundamental rights of man in the modern context, then the courts must take an affirmative role in the application of developed human values and the protection of fundamental expectations. The courts must not be permissive in the face of value deprivations. "We must never forget," Chief Justice Marshall warned, "that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."⁹⁴ The ninth amendment, as part of that dynamic instrument of the people, must be similarly utilized to meet contemporary needs and expectancies of fundamental rights.⁹⁵

It seems quite proper for certain twentieth century courts or judges to have rejected phrases such as "natural laws," "inherent rights," a "sense of justice," or "experience with the requirements of a free society" as especially useful or complete references for the identification of the content of unenumerated rights.⁹⁶ But, it is not proper for courts to have rejected the existence of these rights, and the ninth amendment, merely because legal positivism has subsequently, and improperly, demanded a reliance upon enumerated words.⁹⁷ Each of the above phrases offers an incom-

(1907) (quoting without citation A. Hamilton). The concern for "musty records and mouldy parchments," instead of the will of the living, was also condemned by Thomas Paine. T. PAINE, *supra* note 32, pt. 1, at 12. See also *id.* at 8, 11, 42, 85.

⁹⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis added); see *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (interpreting meaning of eighth amendment "from the evolving standards of decency"); *Weems v. United States*, 217 U.S. 349, 378 (1910) (stating that eighth amendment "may acquire meaning as public opinion becomes enlightened by a humane justice"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821) (declaring that "a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326-27 (1816) (stating that Constitution was written in general terms to enable it to be dynamic and adapt to future).

⁹⁵ See B. PATTERSON, *supra* note 56, at iii-iv, 2-3. In his introduction to the Patterson work, Dean Roscoe Pound declared that the "Ninth Amendment is a solemn declaration that natural rights are not a fixed category of reasonable human expectations in civilized society." *Id.* at iv. See also Ringold, *supra* note 23, *passim* & cases cited therein; Note, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 TEMP. L.Q. 46, 54 (1968); articles cited note 18 *supra*.

⁹⁶ For an apt criticism of similar phrases, *by themselves*, to guide rational and policy-serving decision, see *Furman v. Georgia*, 408 U.S. 238, 257, 270-71, 277-78 (1971) (Brennan, J., concurring). Justice Brennan wants "objective indicators" of "the conscience of mankind" and human dignity values. *Id.* at 278.

⁹⁷ See notes 16-17 and accompanying text *supra*.

plete referent open to a great deal of arbitrary decisional leeway. The problem is not that they are incorrect per se, but that they are insufficient in themselves to provide guidance for rational and policy-responsive decision-making.

In the aggregate, however, these generalizations point to the kind of inquiry a court might properly make. If rights are "inherent" in a dynamic social process, "natural" to a civilized society, based on a "universal sense of justice," or tied to the ongoing "experience" of a free society, a court need not hide from them merely because these phrases are themselves too general. The decision-maker needs, instead, a set of criterial referents to pull the shared content of these rights out of the social process with which they are merged. An initial effort has been made by the courts in their attempts to identify "the traditions and conscience of our people"⁹⁸—the shared expectations—as they intertwine with an "experience with the requirements of a free society"⁹⁹—actual context and the interconnected social, legal, and political processes.

In more general terms, these two indicia of the content of rights can be referred to as patterns of authority, which include empirically demonstrable subjectivities of the people, and patterns of practice or control, the mergence of which has been insightfully recognized as law in social process.¹⁰⁰ Not only are the perspectives of the people important, but the social context as a whole is also relevant for a mapping of the intertwined patterns of authority and control. Even this, however, is only a beginning of the more comprehensive type of inquiry which is needed for identification of "traditions," "collective conscience," "experience," and other aspects of legal process.

Nevertheless, this beginning points to the great utility of documented international human rights as one set of indicia of the shared subjectivities and experience of mankind—indicia which are useful, as well, in a comprehensive inquiry into the types of policies, or goal-values, which the Constitution seeks to protect, the types of policies which, under the United Nations Charter and other treaty law, the United States must also seek to respect and observe,¹⁰¹ the other types of shared subjectivities that our own people possess, and the kind of "experience" in which our society

⁹⁸ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see note 80 and accompanying text *supra*.

⁹⁹ *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting); see note 81 and accompanying text *supra*.

¹⁰⁰ See, e.g., articles cited note 16 *supra*.

¹⁰¹ *The Paquete Habana*, 175 U.S. 677, 700 (1900); note 10 *supra*; see *Henfield's Case*, 11 F. Cas. 1099 (No. 6360) (C.C.D. Pa. 1793); Paust, *supra* note 9; note 43 *supra*.

has participated and continues to participate. Documented human rights are sufficiently particularized for such a judicial discovery. They are also sufficiently particularized to give a more detailed and useful content to expressions such as "the traditions and collective conscience of our people" or a "universal sense of justice," which our courts are already applying. Indeed, it would seem impossible to consider the traditions and collective conscience of this nation, not to mention universal norms, without systematic reference to the rights of man.

Furthermore, the discovery and interpretation of the fundamental rights of man are proper judicial functions. For assistance, the courts can find empirical referents to shared legal expectation in human declarations, social practice, court decisions, legislation, writings of legal scholars, and in universally accepted standards of human rights.¹⁰² In utilizing standards of fundamental human rights, such as the 1948 Universal Declaration of Human Rights,¹⁰³ as a means of *interpreting* the nature and content of rights which already exist and are retained by the people under the ninth amendment, a court would not violate recognized legal principles concerning "political questions," judicial intervention, or the doctrinal hurdle of "self-executing treaties,"¹⁰⁴ since these rights already exist and would merely be protected by the court through a more rational, policy-serving decisional effort. No affirmative or particularized mode of implementation or any "operationalizing"¹⁰⁵ of these rights would be demanded; the court would

¹⁰² See notes 7 & 101 *supra*.

¹⁰³ Note 6 *supra*. For a history of relevant developments, see J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS 9-16, 177-87 (1970); McDougal & Bebr, *supra* note 8, at 637-40.

Professor Brownlie asserts that the Declaration is not binding *as such*, but that some of its provisions "either constitute general principles of law . . . or represent elementary considerations of humanity." He also points out that they have "considerable indirect legal effect" as an authoritative interpretation of the Charter by the General Assembly, and have been regarded as part of the "law of the United Nations." I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 106 (1971).

Many scholars have declared that the entire Universal Declaration is now part of the customary law of human rights. See J. CAREY, *supra* at 13-14. It is the most authoritative and frequently recited resolution of the UN General Assembly, and there can be no doubt of its general acceptance by all nation-states as a binding documentation of basic human rights. See, e.g., sources cited *supra* in this note; J. PAUST & A. BLAUSTEIN, WAR CRIMES JURISDICTION AND DUE PROCESS—A CASE STUDY OF BANGLADESH (1974); Paust, *Human Rights, Human Relations and Overseas Command*, 3 ARMY LAW. I (1973).

¹⁰⁴ This term relates to the old efforts to "implement" treaty law by way of article VI of the Constitution rather than attempt to use internationally documented human rights to aid in the interpretation of the nature and content of those rights of man that were retained by our Forefathers. See notes 10 & 11 *supra*.

¹⁰⁵ By this term is meant the efficacious application or implementation of these rights.

merely strike down governmental and private modes or practices which do not conform. There would be no judicial interference with the legislative discretion to select a particular mode of implementation from among the proper types available, but there would be a judicial guarantee against legislative or other infringement of basic human rights.¹⁰⁶ Moreover, as a prominent international jurist declares, "it is increasingly recognized that there is a human rights dimension to every human interaction and every authoritative decision."¹⁰⁷ Again, action or inaction by the courts will have its effect.

IV

A SKETCH OF THE TYPES OF DISCOVERABLE RIGHTS

A. *Inherited Expectations*

Besides the fundamental rights which have been protected under notions of due process,¹⁰⁸ there are several documentations of the basic human values and liberties that were most likely among those cherished by the framers of the ninth amendment. For example, Kelsey lists certain discovered "natural rights" including personal liberty, personal security, property, religious freedom, freedom of conscience, freedom to contract, freedom to work, the right of privacy, resistance to arbitrary authority, the pursuit of happiness and safety, and the enjoyment of life and liberty.¹⁰⁹ Rogge would add the freedom of movement and rights to knowledge, confrontation with representative authorities, political activ-

¹⁰⁶ See Corwin, *supra* note 14, at 408-09 n.137. See also F. POLLOCK, *THE EXPANSION OF THE COMMON LAW* 128 (1904). Note in this regard that it is already a federal crime for "two or more persons" to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. § 241 (1970); see 18 U.S.C. § 242 (outlawing actions taken "under color of any law . . . or custom," which deprive persons of rights, privileges, or immunities); 42 U.S.C. §§ 1983-86 (1970) (providing for civil suit under Civil Rights Act). See also 10 U.S.C. §§ 818, 821 (1970) (providing for prosecutions to preserve human rights in time of armed conflicts); Paust, *supra* note 9. The Supreme Court has addressed the constitutionality of sanctions under 18 U.S.C. § 241 in *United States v. Guest*, 383 U.S. 745, 753-74 (1966), and *United States v. Price*, 383 U.S. 787, 805-06 (1966). See *Parker v. McKeithen*, 488 F.2d 553, 556 (5th Cir. 1974); *United States v. Delorme*, 457 F.2d 156 (3d Cir. 1972); *Clark v. Ziedonis*, 368 F. Supp. 544 (E.D. Wis. 1973).

¹⁰⁷ McDougal, *supra* note 3, at 387.

¹⁰⁸ For a listing of some of these rights, see articles cited note 73 *supra*.

¹⁰⁹ Kelsey, *supra* note 18, at 313-14. Jefferson had emphasized two inalienable rights: the sanctity of the person and freedom of the mind. Interrelated with these were his belief that "the dignity of man is lost in arbitrary distinctions," his recommendation of "a crusade against ignorance" and an effort to "establish and improve the law for educating the common people," and his emphasis on the "opinion of the people" as the basis of government. MALONE 153-56, 158, 169.

ity, use of the mails, and peaceful picketing or protest.¹¹⁰ Call would include the important right of the people to have the government function in the public interest and for the common good.¹¹¹

This last recognized right, that public interest must be the measure of public action, seems to be related to the naturalist framers' concept that each citizen has an equal political interest in public questions and has equal political rights, including access to the governmental process and an equal voice in its affairs—access to a free and full shaping and sharing of power. It also seems to be related to the concept that any effective denial of the individual's right to political participation in governmental decision-making, through undue deference to minority views or special interest groups by those who hold public office or have public responsibilities, is itself a denial or disparagement by decisional bodies of an aggregate of individual trust—or a denial of the public trust and an "undue" process of law and government. Thomas Paine expressly recognized this right to *full participation* as the saving quality of a representative democracy and added an interrelated "right to know": "In the representative system the reason for every thing must publicly appear. Every man is a proprietor in government, and considers it a necessary part of his business to understand There can be no mystery."¹¹²

Corwin made a thorough study of our inherited values and expectations, and within his work one can discover the basic expectations of human equality,¹¹³ human dignity,¹¹⁴ the sanctity of the home,¹¹⁵ the binding force of contracts,¹¹⁶ property rights,¹¹⁷ popular sovereignty,¹¹⁸ the right to have governmental

¹¹⁰ Rogge, *supra* note 18, at 804-26.

¹¹¹ Call, *supra* note 43, at 122. This might be described as the right to have governmental bodies decide public questions in the public interest. See Locke 76, 78-80, 84, 143 (government limited to public good and cannot enslave, impoverish, or destroy subjects; laws must be designed for common good). See also DECLARATION OF INDEPENDENCE (1776); U.S. CONST. preamble. Thomas Paine described "resistance of oppression" as one of the "natural and imprescriptible rights of man." T. PAINE, *supra* note 32, pt. 1, at 122.

¹¹² T. PAINE, *supra* note 32, pt. II, at 26. Also relevant is Paine's statement that laws continue to derive their force from the consent of the living and that authority exists in the people. *Id.* at 8, 85. For related views of Jefferson, see MALONE 153, 155, 158, 169.

¹¹³ Compare Corwin, *supra* note 14, at 161 with UNIVERSAL DECLARATION arts. 1, 2, 7, 8.

¹¹⁴ Compare Corwin, *supra* note 14, at 169 (citing the thoughts of John Adams) with UNIVERSAL DECLARATION arts. 1-6, 12, 22, 25.

¹¹⁵ Compare Corwin, *supra* note 14, at 371 with UNIVERSAL DECLARATION arts. 3, 12, 16(3).

¹¹⁶ Corwin, *supra* note 14, at 167.

¹¹⁷ Compare *id.* with UNIVERSAL DECLARATION art. 17.

¹¹⁸ Compare Corwin, *supra* note 14, at 162 with UNIVERSAL DECLARATION art. 21.

decisions conform to the public interest,¹¹⁹ and the fundamental expectancy that justice is not to be tied to the written word.¹²⁰ Today, in view of our inherited values and present human needs, Justice Douglas would wish to add the rights to recreation, clean air, and clean water.¹²¹ Since the Framers looked upon Locke as an authoritative source and our own values seem parallel, great weight could also be given to his identification of the following types of human rights: liberty and freedom, equality, life, limb, health, property, peace, safety, governmental functioning according to laws, the public interest and common good, and the right of revolution whenever the government does not effectuate these rights.¹²² This right of revolution, in Locke's view, is not vested in the minority of an identifiable society who seek to come to power or to destroy the social compact based upon the will of the community as a whole, but rather this right lies with the majority.¹²³

B. *Value Categories*

It is clear that the deeper one explores, the more our inherited goal-values come into focus. A most useful and comprehensive

¹¹⁹ Compare Corwin, *supra* note 14, at 165 with UNIVERSAL DECLARATION arts. 28, 29(2).

¹²⁰ Corwin, *supra* note 14, at 158-60. Compare *id.* at 98 (act against natural equity is void) with UNIVERSAL DECLARATION arts. 29, 30. This last comparison is most difficult to make so far.

¹²¹ See *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting). For additional supportive writings, see Ringold, *supra* note 23, at 53 n.153. See also UNIVERSAL DECLARATION arts. 22, 24, 25(1), 27, 28; 1966 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS arts. 1(2), 12(2)(b), 15, G.A. Res 2200A, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6546 (1966). It is difficult directly to compare protections of human quality and life quality with present values connected with environmental protection, but it seems that these values are interdependent.

¹²² See Locke 4-6, 76-77, 79, 84, 122-43.

¹²³ *Id.* at 57-58, 142-43; see VA. CONST. art. I, § 3 (1776) (right of "a majority of the community" to abolish government). It is arguable, under Locke's view, that an identifiable social group could properly claim a right of secession, since it would not be seeking to extend its values or to subjugate democratic values of others, but merely to defend its own. President Lincoln was haunted by a desire to reach the proper balance on the problem, as evidenced by his first Inaugural Address. He believed that

[i]f, by the mere force of numbers, a majority should deprive a minority of any clearly-written Constitutional right, it might, in a moral point of view, justify revolution: it certainly would, if such a right were a vital one.

LINCOLN'S STORIES AND SPEECHES 209 (E. Allen ed. 1900). But at the same time he viewed secession as "the essence of anarchy" (*id.* at 210), a notion against which he attempted to balance his conviction that

[t]his country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending, or their revolutionary right to dismember or overthrow it.

Id. at 212.

overview of the types of values that are discoverable, however, has already been provided by the value matrix worked out by Professors McDougal and Lasswell in reference to "man's long struggle for all his basic human values," that is:

for participation in the processes by which he is governed, equality before the law, and that wide sharing of power, both formal and real, which we call democracy;

for sanctity of person, for freedom from arbitrary restraints and cruel and inhuman punishments, and for positive opportunity to develop latent talents for the enrichment and well-being of personality;

for the enlightenment by which rational decisions can be made and for freedom of inquiry and opinion;

for that fundamental respect for human dignity which both precludes discrimination based on race, sex, color, religion, political opinion, or other ground irrelevant to capacity and provides positive recognition of common merit as a human being and special merit as an individual;

for access to resources to produce goods and services necessary to maintain rising standards of living and comfort;

for acquisition of the skills necessary to express talent and to achieve individual and community values to the fullest;

for freedom to explain life, the universe, and values, to fix standards of rectitude, and to worship God or gods as may seem best;

for affection, fraternity, and congenial personal relationships in groups freely chosen;

for, in sum, a security which includes not only freedom from violence and threats of violence but also full opportunity to preserve and increase all values by peaceful, noncoercive procedures.¹²⁴

These value categories provide a manageable reference to the types of goal-values expected or claimed, and to the values involved in a given instance of social interaction. When integrated

¹²⁴ M. McDUGAL, *supra* note 8, at 336-37.

It is for values such as these that men have always framed constitutions, established governments, and sought that delicate balancing of power and formulation of fundamental principle necessary to preserve human rights against all possible aggressors, governmental and other.

Id. at 337. See H. LASSWELL, A PRE-VIEW OF POLICY SCIENCES (1971); H. LASSWELL & A. KAPLAN, POWER AND SOCIETY (1950). For a comprehensive framework for analysis of human rights, see McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L. L. 237 (1969); McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L. L. 387 (1974). Those of the McDougal-Lasswell jurisprudential orientation use a convenient set of eight value categories to cover the value matrix: power, well-being, enlightenment, respect, wealth, skill, rectitude, and affection.

into the McDougal-Lasswell methodology, they take on a significant utility for systematic and comprehensive exploration of the context and content of law. Moreover, in their role as references to policy and context they perform, with other tools of the methodology,¹²⁵ a most useful role in the interpretation of agreements or constitutions by aiding the decision-maker in his general effort to utilize context as a whole for the ascertaining of shared expectations and all relevant content of the words to be interpreted.¹²⁶

C. *Universal Expectations*

Many of these same enumerated goal-values not only are identifiable in historic works and declarations,¹²⁷ but are also to be found in a long history of human expectation and practice. Further, they are compatible with developed human values and liberties discoverable in contemporary documentations of international human rights and expectations.¹²⁸ Indeed, the international

¹²⁵ Other tools of the methodology include: five intellectual tasks—clarification of policies, description of past trends in decision, analysis of conditions affecting past trends and the realization or thwarting of policies, projection of future conditions, and invention and evaluation of policy alternatives—, phase analysis for description of social interaction in actual context—participants, perspectives, situations, resources, strategies utilized, outcomes, long-term effects—, analysis of decision process in terms of seven "authority functions"—intelligence, promotion, prescription, invocation, application, termination, appraisal—, and others. See, e.g., McDougal, Lasswell, & Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365 (1973); sources cited in notes 16 & 124 *supra*.

¹²⁶ See M. McDUGAL, H. LASSWELL & J. MILLER, *supra* note 81.

¹²⁷ See, e.g., I. BROWNIE, *supra* note 103, at 4-7; Corwin, *supra* note 14. Professor Brownlie sets forth the English Bill of Rights of 1688. Even at that early date, the numerous rights listed were considered to be "ancient" and "undoubted" rights and liberties, and they included various formulations of a right to have governmental bodies function according to the law and not in an "arbitrary" manner. There is also language which supports the right to have the government function in the public interest and not to the prejudice of the people. I. BROWNIE, *supra*, at 6.

"And they do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties and that no declarations, judgments, doings or proceedings to the prejudice of the people in any of the said premises ought in anywise to be drawn hereafter into consequence or example.

Id.

¹²⁸ The general types of rights identifiable throughout the text can be even more extensively compared with others articulated in the 1948 Universal Declaration of Human Rights, the 1966 Covenant on Civil and Political Rights, and the 1966 Covenant on Economic, Social, and Cultural Rights. For a presentation of these documents, see I. BROWNIE, *supra* note 103, at 106-12, 199-210, 211-31. In many cases, developed and developing international standards are more specific. Some initial and minimal comparisons are suggested in notes 113-21 *supra*. Note that where certain international instruments go beyond the mere mapping of the boundaries and content of the rights to include specific modes of guarantee or implementation, the courts might well conclude that they will look only to the right, leaving such exact modes to the approval of executive and legislative branches. Two notable exceptions will involve (1) judicial protection and (2) judicial implementation where no specific mode exists, as in the cases of "the right to life," freedom

rights and developed norms are in many cases more specific and empirically demonstrable for juridical use.¹²⁹ A fundamental source of the content of present human rights law has been the 1948 Universal Declaration of Human Rights.¹³⁰ Although not directly a part of treaty law, it has been widely accepted as binding, as an authoritative instrument for interpretation of the United Nations Charter, which is treaty law, and as a document which partially evinces certain general principles of law recognized by civilized nations and certain general content of rights that are of a customarily international character.

An example of the Declaration's greater detail can be seen in connection with the question of remedies for rights deprivations. Article 8 of the Universal Declaration provides:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.¹³¹

Article 10 supplements this individually instigated sanctioning process as follows:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations¹³²

And Article 28 adds:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.¹³³

An international expectation of particular importance to the prior discussion of authority and to ongoing inquiry into the calculated interference by Mr. Nixon and others with the electoral process, the full and free expression of the will of the people,¹³⁴ is contained in Article 21:

from "cruelty," freedom from inhumane treatment, injury, or death, the right of privacy, and, something increasingly important, the right to adequate "food, clothing, housing and medical care," among others. UNIVERSAL DECLARATION arts. 3, 5, 12, 25.

¹²⁹ This fact, and the utility of human rights law for the interpretation of the ninth amendment, have been recognized by at least one other current author. See Ringold, *supra* note 23, at 35, 48-49. However, perhaps because he is not an international lawyer, Ringold incorrectly stated that the 1948 Universal Declaration represents a moral consensus but not law. *Contra*, Paust, *supra* note 103, at 1. See also J. CAREY, *supra* note 103, at 12-16.

¹³⁰ UNIVERSAL DECLARATION, *supra* note 6.

¹³¹ *Id.* art. 8.

¹³² *Id.* art. 10.

¹³³ *Id.* art. 28.

¹³⁴ See pp. 240-44 & 251-52 *supra*.

Everyone has the right to take part in the government of his country The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections¹³⁵

Since the expected right to full participation in the governmental process is a human right, since all persons are entitled to an effective remedy by a competent national tribunal and to a full hearing in that regard,¹³⁶ and since not only human rights are involved in such a question but also the claimed subversion of the authority of the people and the due process of government itself, this type of integrated guarantee takes on a significance of far greater import than the mere words of the fifth amendment to the Constitution would seem to suggest.¹³⁷ It binds a court to action and it takes on a significance not at all unlike the inherited expectations found in the Declaration of Independence and the state constitutions considered above.¹³⁸ Furthermore, when the subversion of the authority of the people and the due process of government is involved, that is certainly a proper time for the exercise of judicial power.¹³⁹ The alternative is clearly expressed in the early state constitutions, the Declaration of Independence, and elsewhere: the reform, alteration, or abolition of government or the less drastic response of impeachment, removal from office, and new elections.¹⁴⁰

¹³⁵ A related right of individuals in the aggregate is covered by the right of the people to self-determination or to the free and full sharing and shaping of power. See, e.g., U.N. CHARTER art. 1(2); G.A. Res. 2625, *supra* note 1; J. PAUST & A. BLAUSTEIN, *supra* note 103; Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action*, 5 GA. J. INT'L & COMP. L. — (1974); Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1, 10, 19-20 (1974); E. Suzuki, *Self-Determination and World Public Order: Community Response to Group Formation*, 1974 (unpublished J.S.D. thesis, Yale Law School).

Article 21 is also relevant to the contemporary threat the Watergate crimes pose to the due process of governmental elections and the free expression of the will of the people.

¹³⁶ See notes 131-32 and accompanying text *supra*.

¹³⁷ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

U.S. CONST. amend. V.

¹³⁸ See generally state constitutions cited note 30 *supra*; notes 36-38 & 58 *supra*.

¹³⁹ See generally *United States v. Nixon*, 94 S. Ct. 3090 (1974); Paust, *supra* note 9, at 17-22.

¹⁴⁰ See note 30 and accompanying text *supra*. In his first inaugural address, Abraham Lincoln voiced this alternative:

This country, with its institutions, belongs to the people who inhabit it. Whenever they grow weary of the existing government, they can exercise their constitutional right of amending, or their revolutionary right to dismember or overthrow it.

LINCOLN'S STORIES AND SPEECHES 212 (E. Allen ed. 1900); see note 123 *supra*.

CONCLUSION

When the courts attempt to map out the full range of rights content in connection with any matter, they should inquire into both the domestic and the universal normative content for a more complete identification of the boundaries and content of each type of right. Although it is true that universal values must necessarily be our own, there may be fundamental domestic norms which supplement or affect the complete meaning of those rights within our society. Furthermore, in some cases the actual content of the developing international rights may not be sufficiently clear or uniform so as to conclude that nation-states are in agreement on the particularized content of a right or are much beyond a state of rhetorical unification.¹⁴¹ What is important, however, is that there exists a large documentation available for judicial use which generally exceeds that of the normative values which the courts do not hesitate to apply under notions of "due process" and "equal protection." The judicial branch no longer has an excuse for failing to protect these rights against abuse. To preserve peace and their own liberties, the courts must even guard against oppressions of the people and the allowance of denials of right which can destroy the highest form of laws and order—the rights of man and the order of human dignity.

¹⁴¹ See McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); McDougal, Lasswell & Chen, *supra* note 124, at 238.